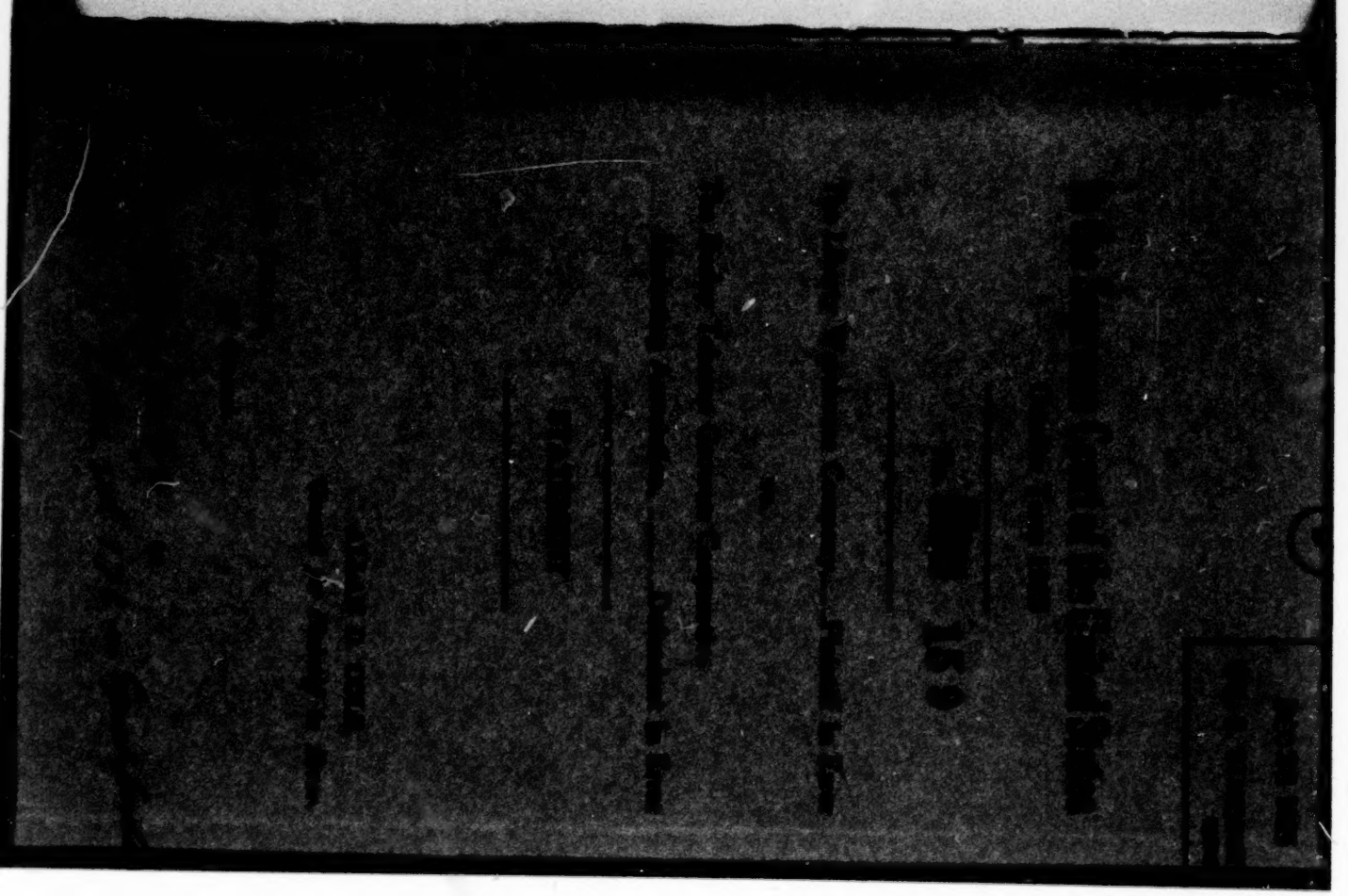

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1925

No. 584.

he Liberty Warehouse Company, ... Plaintiff In Error

vs.

he Burley Tobacco Growers Cooperative Marketing Association, ... Defendant In Error

IOTION TO ADVANCE PURSUANT TO RULE 18 SUBSECTION 7

Now, comes plaintiff in error, The Liberty Warehouse Company, a corporation, by its attorney of record herein and moves this Honorable Court pursuant to rule 18 subsection 7 to advance the above styled cause for an early hearing because the matters involved are of general public interest.

ALLAN D. COLE,
Attorney for Plaintiff in Error.

M. COLLINS, Of Counsel.

NOTICE OF MOTION

The defendant in error, The Burley Tobacco Growers Cooperative Marketing Association, is hereby notified that the plaintiff in error, The Liberty Warehouse Company, will, on Monday the 18th day of January, A. D., 1926, submit the foregoing motion for the consideration of the Supreme Court of the United States.

ALLAN D. COLE,

Attorney for Plaintiff in Error.

J. M. COLLINS, Of Counsel.

Executed on the Burley Tobacco Growers Cooperative Marketing Association by delivering a true copy of the within notice to J. N. Kehoe, its Vice President, he being the Chief Officer of said Association residing in Mason County, Kentucky, this 24th day of December, 1925.

C. M. DEVORE,

Sheriff of Mason County, Kentucky.

By C. P. RASP, Deputy Sheriff.

State of Kentucky)
County of Mason) Sct.

I, B. L. Anderson, a Notary Public in and for the County and State aforesaid do certify that C. M. Devore is a regularly elected and acting sheriff of Mason County, Kentucky, and that C. P. Ra[illegible], who made the return on within notice is personally known to me and that he is one of the regularly appointed and acting Deputy Sheriffs of Mason County, Kentucky.

Given under my hand and seal this 24th day of December, 1925.

My Commission expires September 26th, 1927.

B. L. ANDERSON,

Notary Public, Mason County, Kentucky.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1925

No. 584.

The Liberty Warehouse Company, ...Plaintiff In Error

vs.

The Burley Tobacco Growers Cooperative Marketing Association, ...Defendant In Error

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STATEMENT

MAY IT PLEASE THE COURT:

In Kentucky, where the common law prevails, growers of tobacco and other agricultural products have been exempted from its provisions, in that, as a class they are authorized through corporate organizations to market their products and to do all things necessary thereto as monopolies, pools and trusts under what is

known as the Bingham Act. See Appendix to brief of plaintiff in error.

The questions involved in this case are of general public interest for the following reasons:

In the first place, in addressing the annual convention of the American Farm Bureau Federation at Chicago recently the President is reported to have said: "I propose actively and energetically to assist the farmers to promote their welfare through cooperative marketing." In his recent message to the Congress the President is also reported to have said: "It has appeared from all investigations that I have been able to make that the farmers as a whole are determined to maintain the independence of their business. They do not wish to have meddling on the part of the government or to be placed under the inevitable restrictions involved in any system of direct or indirect price-fixing, which would result from permitting the government to operate in the agricultural markets. They are showing a very commendable skill in organizing themselves to transact their own business through cooperative marketing, which will this year turn over about $2,500,000,000, or nearly one-fifth of the total agricultural business. In this they are receiving help from the government. The Department of Agriculture should be strengthened in this facility in order to be able to respond when these marketing associations want help. While it ought not to undertake undue regulation, it should be equipped to give prompt in-

formation on crop prospects, supply, demand, current receipts, imports, exports and prices.

A bill embodying these principles, which has been drafted under the advice and with the approval of substantially all the leaders and managers in the cooperative movement, will be presented to the Congress for its enactment."

Since this court speaks with authority, it is manifestly important that before the President exercises these great powers of his office he be properly advised as to the constitutional standing of these numerous cooperative marketing associations of which defendant in error is a type, created by the various states. Whether or not, therefore, in making them vast loans and otherwise "actively and energetically assisting" cooperative marketing as practiced by them, he is discriminating in favor of one class of citizens as against another class and so denying to the latter the equal protection of the laws; indeed, whether or not, in fulfilling the promises thus made, he is really aiding, abbetting and fostering a host of illegal monopolies, pools and trusts of which defendant in error is a type, and therefore, unlawfully restraining the flow of commerce and likewise abridging the liberty of contract of citizens of United States.

In the second place, section 27 of the Articles of Incorporation of these numerous organizations of which defendant in error is a type has already been attacked upon the ground of its conflict with the 14th Amend-

ment in the Supreme Courts of the states of Kentucky, Wisconsin, and Minnesota; the first holding the section to be constitutional, the last two declaring the section in violation of the liberty of contract guaranteed by the Federal Constitution. See brief of Plaintiff in error at page 23.

In the third place, in the case at bar the validity of all the provisions of the Articles of Incorporation of these organizations of which defendant in error is a type has been called in question; and it is of vital importance, both to the vast citizenship of the United States, as well as to the numerous courts passing upon their rights and duties to know at once and with a certainty what to declare and to do.

ALLAN D. COLE,

Attorney for Plaintiff in Error.

J. M. COLLINS, Of Counsel.

FILED
[redacted]
WM. R. STANSBURY
Clerk

In the Supreme Court of the United States

October Term 1928

No. [redacted] 159

The Liberty Warehouse Company, Plaintiff in Error

vs.

Burley Tobacco Growers Cooperative Marketing Association.....Defendant in Error

Brief For Plaintiff in Error

ALBAN B. COLE,
Counsel for Plaintiff in Error.

J. M. Chapman,
Of Counsel.

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V. Since the Bingham Act as a whole and section 27 in particular, are repugnant to the Federal Constitution the answer of plaintiff in error contains good defense; and its counterclaim constitutes a direct action for damages 38

A

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Because the Court of Appeals of Kentucky held it to be correct practice to file the counterclaim, it, therefore, considered the question as to the constitutionality of the Bingham Act, both in whole and in part, but rested its disallowance thereof upon two untenable grounds. First, because of its partial repeal the remedies of the common law available against all others for violations thereof cannot be invoked in Kentucky against those of the class to which defendant in error belongs; and, second, that remedies available against all others for violations of the Sherman Anti-Trust Law, as amended, cannot be invoked herein because defendant in error as one of a favorite class has been exempted from the penalties therein provided 52-57

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IN SUPREME COURT OF THE UNITED STATES
October Term 1925

No. 584.

The Liberty Warehouse Company, Plaintiff in Error

vs.

Burley Tobacco Growers Cooperative Marketing Association, Defendant in Error.

Error to the Court of Appeals of Kentucky.

Brief For Plaintiff in Error

May It Please the Court:

Statement

The plaintiff in error, The Liberty Warehouse Company, a Kentucky corporation, is engaged in the business of a warehouseman, a large portion of whose business consists of shipments of tobacco from growers in Missouri, West Virginia, and Ohio, in bulk and in hogsheads or original packages to be sold over the floor

of its loose leaf warehouse in Maysville to citizens of Kentucky and other states in response to whose demands these shipments are made and who buy them in bulk or hogsheads or original packages and also as loose leaf when taken therefrom through the agency of plaintiff.

The defendant in error, The Burley Tobacco Growers Cooperative Marketing Association, is a Kentucky corporation organized under what is known as the Bingham Act by numerous tobacco growers in what is known as the Burley Tobacco District who have heretofore been competitors in the open market in the sale of their products, but who now agree through corporate organizations to market their products to manufacturers throughout the United States at a price to be fixed by an executive committee; the members of the association not being permitted to sell their products to any one except to the association and at prices to be fixed by it and not being permitted to buy or sell their products in competition with each other; provisions being made for reports of the sales of the products shipped by the various members to the organization and the prices thereof and the profits of the organization in excess of payments made on delivery to be paid to the members of the association.

Now, this is a proceeding, under the Kentucky Declaratory Judgment Act and involves the validity of

said Bingham Act as an entirety, as well as section 27 thereof in particular, which section is as follows:

"Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any members of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such members products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each said offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of action thereon. In addition, said warehouseman shall pay to the association a reasonable attorneys fee and all costs involved in any such litigation or proceeding at law. This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violation of co-operative contracts". Acts of General Assembly of Kentucky, January 10, 1922, c. 1. p. 21, 27, R. 3.

Now, in the course of conducting the business of an illegal monopoly, pool and trust, the defendant in error suffered a breach of contract by one of its mem-

bers who refused to deliver his tobacco to it, but sold it over the floor of the loose leaf warehouse of plaintiff in error.

Hence, defendant in error pursuant to section 27 of said Bingham Act brought suit against plaintiff in error for the fixed sum of five hundred ($500) dollars and attorneys fees on account of this transaction in the course of its business. Plaintiff in error demurred to the petition, but its demurrer was overruled. Thereupon plaintiff in error filed an answer and counterclaim containing three paragraphs.

In the first paragraph plaintiff in error alleged facts showing defendant in error to be an alleged monopoly, pool and trust, and plead these facts in estoppel of its right to recover damages for inducing the alleged breach of contract. R. 18.

In the second paragraph plaintiff in error plead that section 27 of the Bingham Act is repugnant to the 14t4h Amendment to the Federal Constitution. R. 19.

In the third paragraph plaintiff in error, among other things, alleged facts showing that it was and is engaged in interstate commerce and that the Bingham Act is in conflict with the Federation Constitution, as well as the Sherman Anti-Trust Law, as amended, and, therefore, alleged injury done to its business by reason of the conduct of the business of defendant in error as an alleged monopoly, pool and trust, of which the transaction sued on is a part. R. 19-24.

Entitled to damages at common law, plaintiff in error, counter-claimed against defendant in error for the injury done its business; but also invoked treble damages under the Sherman Anti-Trust Law in the sum of ($60,000).

However, the trial court overruled the demurrer of plaintiff in error to the petition, sustained the demurrer of defendant in error to the first and second paragraphs of said answer and counterclaim as amended and struck out the third paragraph thereof as amended; but ordered and made said third paragraph a part of the record for the purpose of appeal. Thereupon, the plaintiff in error declining to plead further the trial court, in effect, declared the Bingham Act as a whole and section 27 in particular, to be constitutional; and, consequently, entered judgment against plaintiff in error for ($500) and in addition thereto awarded defendant in error an attorneys fee of $100.00, to all of which judgment plaintiff in error objected and excepted, and which, on an appeal to the Court of Appeals of Kentucky was on May 1, 1925, affirmed, and, having been taken to this court on writ of error, is now sought to be reversed on the grounds hereinafter set forth. R. 25.

ASSIGNMENT OF ERRORS

Now comes the said appellant, Liberty Warehouse Company, the plaintiff in Error, and avers that in the record, proceedings, decision and final judgment of

the Court of Appeals of Kentucky, in the above entitled cause, there is manifest error to its prejudice and it, therefore, makes the following assignment of errors therein, to-wit:

First. The said Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in affirming and in not reversing the judgment of the Mason Circuit Court.

Second. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding an Act of the General Assembly of the Commonwealth of Kentucky indexed and cited as "The Bingham Co-operation Marketing Act", approved January 10, 1922, not in conflict with or contrary to the 14th Amendment to the Constitution of the United States.

Third. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that section 27 of said Bingham Act of the General Assembly of the Commonwealth of Kentucky and cited as "The Bingham Co-operative Marketing Act", approved January 10, 1922, not in conflict with or contrary to the 14th Amendment to the Constitution of the United States.

Fourth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding said Act of the General Assembly of the Commonwealth of Kentucky indexed and

cited as "The Bingham Co-operative Marketing Act", approved January 10, 1922, not in conflict with or contrary to Article 1, section 8 to the Constitution of the United States.

Fifth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding section 27 of said Act of the General Assembly of the Commonwealth of Kentucky not in conflict with or contrary to the Commercial Clause of the Constitution of the United States.

Sixth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding said Act of the General Assembly of the Commonwealth of Kentucky not in conflict with or contrary to the Sherman Anti-Trust Law and the Clayton Amendment thereto.

Seventh. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding section 27 of the General Assembly of the Commonwealth of Kentucky not in conflict with or contrary to the Sherman Anti-Trust Law and the Clayton Amendment thereto.

Eighth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding, upon the undisputed facts disclosed by the record, that neither said Act of the General Assembly of the Commonwealth of Kentucky nor any of its sections was contested because of an uncon-

stitutional administration of its provisions.

Nineth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding, upon the undisputed facts disclosed by the record, that the constitutionality of said Act of the General Assembly of Kentucky and the various provisions thereof were contested only upon the ground that the provisions thereof themselves were unconstitutional and in refusing even upon said ground to hold said Act invalid.

Tenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights, upon the undisputed facts disclosed by the record, in drawing an invalid distinction between an unconstitutional administration of the provisions of said Act of the General Assembly of the Commonwealth of Kentucky and the administration of the provisions of said unconstitutional Act; and in refusing to give effect to the commercial clause of the Constitution of the United States and to the 14th Amendment thereto.

Eleventh. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in refusing to give effect to the Sherman Anti-Trust Law and the Clayton Amendment thereto; and in holding and deciding, upon the undisputed facts disclosed by the record, that said Clayton Amendment absolutely excludes agricultural products from the provisions of the Sherman Anti-Trust Law.

Twelfth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that because section 27 of said Act of the General Assembly of the Commonwealth of Kentucky does not, until completed, penalize any of the steps necessary for the removal of tobacco in interstate commerce, it does not, therefore, regulate or interfere with the interstate commerce or violate the commercial clause of the constitution of the United States.

Thirteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that the Commonwealth of Kentucky under section 27 of the Act in question has power to regulate interstate commerce in that by virtue of said section plaintiff in error can be penalized for any steps necessary for the removal of said tobacco to its warehouses in Kentucky, when after the removal of said tobacco to its warehouses in Kentucky, plaintiff in error does something in addition to steps taken by it necessary to such removal **whereby** the violation of the members contract with the association, beginning with the steps necessary for the removal of said tobacco in interstate commerce, thereafter becomes **"complete"**; and in holding and deciding where Acts done partly in one state and partly in another state together constitute a violation which can be penalized as an offense that such statute is not a regulation of interstate commerce.

Fourteenth. The Court of Appeals of Kentucky

erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment of the Federal Constitution by giving the cause of action therein provided only to cooperative associations to which defendant in error belongs for the violation mentioned in said section and by excluding therefrom and in not providing a similar remedy for all individuals and other corporations.

Fifteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment to the Federal Constitution because it takes from the jury the right to determine the amount of damages that should be recovered and thus denies it the equal protection of the laws.

Sixteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment to the Federal Constitution by denying to it the equal protection of the laws in that it contains no provision for plaintiff in error to recover an attorneys fee against defendant in error in the event it should induce the patrons of plaintiff in error to breach their contracts and deliver their tobacco to it.

Seventeenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial

rights in not holding and deciding section 27 of said Act violates the 14th Amendment of the Federal Constitution in that it prescribes for cooperative associations alone and not to others a penal action without the creation of a public offense as provided in Kentucky Criminal Code, section 11, whereby the equal protection of the laws is denied to all individuals and to all corporations not included in said Act.

Eighteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment of the Federal Constitution in prescribing a special cause of action unknown to the common law in favor of defendant in error and not to plaintiff in error whereby the equal protection of the laws is denied to plaintiff in error.

Nineteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment of the Federal Constitution because it takes from the jury the right to determine the amount of damages, if any, that should be recovered and thus deprives it of due process of law.

Twentieth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that where there is allegation and proof that a monopoly has actually been created or that trade has been restrained a monopolistic con-

tract or one in restraint of trade cannot be annuled as violative of the Anti-Trust provisions of the Sherman Act or that the said Bingham Act has power and authority to validate such a contract.

Twenty-first. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in taking and substituting "judicial knowledge" of an alleged history of the country and current events as a controlling reason to the exclusion of the undisputed facts disclosed by the record and thereby denying to plaintiff in error due process of law.

Twenty-second. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that section 27 of said Act does not violate the 14th Amendment to the Federal Constitution in that it gives to defendant in error additional cause of action growing out of the poolers contract and withholds the privilege from plaintiff in error and all others similarly situated and thus denies the equal protection of law to all individuals and all corporations not included in said Act.

For the foregoing prejudicial errors and each of them affecting the merits of this cause, the plaintiff in error prays a reversal of the judgment of said Circuit Court of Mason County, Kentucky, and the judgment of affirmance thereof by the Court of Appeals of Kentucky.

And the said Liberty Warehouse Company, Plain-

tiff in Error, prays that the judgment aforesaid, for each of the errors aforesaid, and for other errors in the record and proceedings in said cause, whereby the said Plaintiff in Error has been by said judgment deprived of said rights, privileges and immunities and for each of the errors and matters above assigned be reversed, annulled and held for naught; that said Plaintiff in Error may be restored to all things it has lost by reason of said judgment of said Circuit Court of Mason County, Kentucky, and by the affirmance theerof by the said Court of Appeals of Kentucky.

ARGUMENT

I.

The Court of Appeals of Kentucky Erred to the Prejudice of Plaintiff in Error's Substantial Rights in Taking and Substituting "Judicial Knowledge" of an Alleged History of the Country and Current Events as a Controlling Reason to the Exclusion of the Undisputed Facts Disclosed by the Record and Thereby Denying to Plaintiff in Error Due Process of Law.

Before discussing in detail the alleged errors it may be well in a general way to point out that the Court of Appeals of Kentucky attempts to justify legislative action with respect to what is believed to be an unconstitutional statute by resorting to the doctrine of "judicial knowledge" to the exclusion of admitted facts

which do not justify the legislative action in controversy.

In the opinion of the court herein, it is said: "We take judicial knowledge of the history of the country and current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the farmer obtained a grossly inadequate price for his products. So much was that the case that the intermediate handlers between the producer and final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power." R. 34.

Now, in R .C. L. 1059, it is said: "But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge,

and so will not be judicially recognized. A matter properly a subject of judicial notice must be "known", that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient attaches to the fact involved as to make it safe and proper to assume its existence without proof." Walton vs. Stafford 43 N. Y. S. 1049; North Hempstead vs. Gregory, 65 N. Y. S. 867.

In the case of Peyroux vs. Howard, 7 Pet. 342, it is said: "It cannot certainly be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet, it can not doubt, that there are many facts, particularly with respect to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than **parol proof**; which the court may judicially notice."

In the case of Brown vs. Piper, 91 U. S. 337, it is said: "This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

Therefore, in the case of Arkansas vs. K. & T. Coal Co., 183 U. S. 190, it is said: "And as to **judicial knowledge** the principle applies "that the right of a court to act upon what is in point of fact known to it, must be subordinate to those requirements of form, and orderly communication which regulate the mode of

bringing controversies into court, and of stating and conducting them." Thayer Ev. Chap. 7, 181."

Hence, in the case of Powell vs. Brunswick Co. Supers, 150 U. S. 433, it has been held that judicial knowledge could not be resorted to to raise controversies not presented by the **record**, as follows: "If it appear from the **record** by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, **that will be sufficient**; but resort cannot be had to the expedient of importing into the record the legislation of the state **judicially known** to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters **actually presented and considered.**"

In the case of First National Bank vs. Ayers, 160 U. S. 667, it is said: "From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take what counsel for plaintiff calls, "judicial notice" of what is **claimed** to be a fact, viz., that the moneyed capital in the state of Kansas from which debts may be deducted as compared with the moneyed capital invested in the shares of national banks, was so large and

substantial as to amount to an illegal discrimination against natioanl bank shareholders. **This we cannot do. There is no proof whatever upon the subject."**

Since the supremacy of the Federal Constitution is the question at issue, it is submitted that this court, in determining whether or not it will resort to the doctrine of "judicial knowledge" herein, is obligated to follow its own decisions.

II.

Section 27 Of the Bingham Act Is Repugnant to the 14th Amendment to the Federal Constitution.

A

Now, in the first place, it will be observed that the liability imposed upon plaintiff in error and the cause of action resulting to defendant in error therefrom is either a civil action for a penalty, or else a proceeding in the nature of a suit for unliquidated damages. But a penal action cannot be prosecuted without the commission of a public offense, Kentucky Criminal Code, section 11; and a criminal offense is defined to be "any act or commission for which the law has prescribed a punishment." Kentucky Criminal Code, section 4. Since section 27 of the Bingham Act undertakes to confer upon defendant in error and others of its class the exclusive right to prosecute a penal action where no penal offense has been committed, it denies to plaintiff in error the equal protection of the laws, therefore, repugnant to the 14th Amendment.

B

In the second place, if the right of recovery so conferred upon defendant in error by section 27 be not a penal action, but a proceeding in the nature of a suit for unliquidated damages; it still denies to plaintiff in error, in particular, the equal protection of the laws, in that it creates a cause of action unknown to the common law, as declared in the case of Chambers & Marshall vs. Baldwin, 91 Ky. 121; and, hence, is an exclusive privilege and, therefore, repugnant to the 14th Amendment.

C

In the third place, it denies to plaintiff in error the equal protection of the laws in that it excludes **all** individuals and **every** corporation not organized under the Bingham Act from the enjoyment of a right of action for a tort against a third party for inducing or persuading one of the parties to breach a contract, and, hence, is repugnant to the 14th Amendment. For, in the case of Atchison, etc., R. R. Co., vs. Matthews, 174 U. S. 104, it is said:

"It cannot pick out one individual or one corporation and enact whenever he or it is sued that judgment shall be for double damages or subjected to an attorneys fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule." In re: Opinion of Justice, 211 Mass. 618.

D

In the fourth place, section 27 of the Bingham Act is repugnant to the 14th Amendment in that it denies to plaintiff in error due process of law, as well as, the equal protection of the laws, in that it takes from the jury the right to determine and from the plaintiff in in error the right to have them determine the amount of damages to the "property" of defendant in error based upon the facts of the case. For in 6 R. C. L. at page 453, it is said:

"It has been judicially stated that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him, and that due process of law not only requires that a party shall be properly brought into the court, **but that he shall have the opportunity when in court to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property or his liberty. Due process of law clearly implies the right of a person affected thereby to present before the tribunal which pronounces judgment concerning his life, liberty or property, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved"** In 12 C. J. 1234, it is said:

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which proceeding

the citizen has a right and an opportunity to be heard and to defend, protect, and enforce his rights, by establishing **any fact** which, under the law, would be a **protection** to him or to his **property.**" L. & N. vs. Finn 235 U. S. 608.

E

In the fifth place, the provision in section 27 for the allowance of attorneys fees denies to plaintiff in error the equal protection of the law, in that the classification is based upon persons and not upon the character of the litigation. It is capricious and arbitrary. For section 27 imposes a civil liability of ($500) besides attorneys fees whether the member's products exposed for sale are worth $50.00 or $500. Hence, it is rupgnant to the 14th Amendment. Atchison etc., Ry. Co. vs. Vosburg, 238 U. S. 59.

Indeed, it will be seen that the Vosburg case is decisive when it is observed that section 27 no where imposes a penalty or liability in the event a member of the association should solicit or persuade any non-member to breach his contract with any other non-member with respect to his tobacco and induce him to become a member of and deliver it to the association and thus take the tobacco contracted to be sold over plaintiff in error's loose leaf floor, even tho such solicitation or persuasion of permission systematically pursued should result in breaches of contract to such an extent as utterly to destroy the business of plaintiff in error. Indeed,

why should not plaintiff in error and all others excluded from the favoritism of section 27 also have an adequate remedy in the courts against those who encourage violations of their contracts? If the public health, welfare and morals are affected in the one case, why are they not equally so in the other? If not in either case, then what occasion is there for the exercise of the police power?

F

In the sixth place, section 27 of the Bingham Act prohibiting third parties to buy or handle products under contract with defendant in error infringes the liberty of contract guaranteed to plaintiff in error by the 14th Amendment and the remedies for violations of said section fall with it.

For in the case of Minnesota Wheat Growers Co-operative Market Association vs. Radke 204 N .W. 314, it is said: "Where parties voluntarily become members of an association operating under a statute fixing their rights and duties and providing remedies and penalties for breaches or violations, they may be held to have agreed, to all the terms of the statute, and are not in a favorable position to complain of infringement of the liberty of contract or that the damages or penalties prescribed in the statute are too drastic. But no consent can be imputed to non-members. No contractual relation exists between them and the association or its members. Of course, it is well settled that a

malicious interference by one not a party to a contract to induce its breach is a tort for which redress may be had. Canellos vs. Zotalis, 145 Minn. 292, 177 N. W. 133, Bacon vs. St. Paul Union Stockyards Co. (Minn.) 201 N. W. 326. But section 27 does not stop with those who maliciously interfere with existing contracts between third parties. It makes it an actionable wrong for one who has used no effort or held out no inducement for a member of a co-operative market association to breach his contract with the association, except this, **that he is ready at his usual place of business to buy or handle products that such member may voluntarily bring there for sale or disposal, the same as for an outsider.**

In other words, the section attempts to prevent **all** dealings **between members of a cooperative marketing association and outsiders** in respect to products contracted for by the association, no matter how free from legal malice or devoid of inducement the conduct of the outsiders may have been, provided they knew that the product was under contract. The court in Sweeney vs. Smith (C. C.) 167 F. 385, (affirmed in 171 F. 645, 96 C. C. Q. 919) said:

"I have been referred to no decision, and I have found none, in which mere knowledge of the earlier contract was held to be the equivalent of inducement or persuasion or (still less) of fraudulent conduct."

On the reargument of Northern Wisconsin Co-

operative Tobacco Pool vs. Bekedal, 182 Wis. 571, N. W. 936, the court modified the injunction so that defendant was permitted to purchase from those members of the plaintiffs association who had voluntarily breached their contract with the plaintiff, thus recognizing the constitutional right of liberty of contract. As section 27 reads, a purchase from a member who has voluntarily breached his contract with the association is within its condemnation. For, when such member without inducement from an outsider brings to the latters place of business for sale or disposal a commodity which is under contract for delivery to his association, he has breached his contract with it, and must be held to have so breached it voluntarily.

It seems clear to us that it is beyond the power of the Legislature to make it a tort to purchase, in the ordinary course of a legitimate business, from the true owner a wholesome staple commodity upon which there is no lien and which is not under any ban or regulation because of inherent qualities or use. Liberty of contract is assured by both state and federal constitutions. Williams vs. Evans, 139 Minn. 32, 165, N. W. 495, 166 N. W. 504, L. R. A. 1918 F, 542, and cases therein cited. This liberty of contract as said in Miller vs. Wilson, 236, U. S. 373, 35, S. Ct. 343, 59 L. Ed. 628, L. R. A. 1915 F, 829, "is freedom from arbitrary restraint_____not immunity from reasonable regulation to safeguard the public interest; the question is

whether the restrictions of the statute have reasonable relation to a proper purpose." The latest utterance on this subject is Wolf Packing Co. vs. Court of Industrial Relations of Kansas, 45 S. Ct. 441, 69 L. Ed. ____, opinion filed by United States Supreme Court April 13, 1925. Respondent argues that the marketing of agriculture products is fraught with such public interest as to justify regulation. Conceding that to be so, we are nevertheless convinced that the length to which the section mentioned goes is an arbitrary restraint and not a proper regulation. The last paragraph in the section, intended perhaps, evidently to express the legislative purpose, is evidently borrowed from the experience of other states relating to crops not raised to any important extent in this state. But even so, we can discover no public interests so affected by the ordinary manner of marketing staple agricultural products that every one except associations formed under this law must be forbidden to purchase or handle the same, if offered for sale or disposition in the usual course, of trade by members of co-operative market associations who have not been solicited so to do by the holding out of questionable inducements.

Entertaining the view that section 27 clearly invades the freedom of contract guaranteed both by the state and federal constitutions, it cannot stand. And since the right of injunction, the damages, and attorneys fees therein provided must necessarily fall with it,

there is no necessity to consider whether the remedies are so drastic as, on that account alone, to vitiate the section.

The order in each case must be reversed."

III.

The Purpose of Classification Under Section 27 of the Bingham Act Is Private, Not Public Welfare.

Manifestly, the purpose of the classification is to protect co-operative contracts **exclusively**, as is evidenced both by the opinion of the Kentucky Court of Appeals herein and by the language of the section itself relating to this point, which is as follows:

"This section is enacted in order to prevent a recurrence or out break of violence and to marketing associations an adequate remedy in the courts against those who encourage violations of **co-operative** contracts." In this connection the court said. "The **penalty** imposed upon the warehouseman is directed **solely** against it to prevent it from destroying **any contractual relations existing between plaintiff and its members.**" R. 36 (fol. 69).

Now, in the case of Lawton vs. Steele, 152 U. S. 137, it is said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a **patricular** class, requires such interference; and, second, that the means are reason-

ably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the **guise** of protecting the **public** interests arbitrary interfere with private business or impose **unusual** or **unnecessary restriction** upon lawful occupations. In other words, its determination as to what is the proper exercise of its police power is not final or exclusive, but is subject to the supervision of the courts."

In the case of Adams vs. Tanner, 244 U. S. 595, it is said: "Certainly, there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its depression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of every one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if any whenever some ostensible justification is advanced and the public power is invoked."

Moreover, in the multitude of decisions of the U. S. Supreme Court involving the right of a state to regulate private business, the distinction is always clearly drawn between private welfare and public welfare. Noble State Bank vs. Haskell, 219 U. S. 104, Eubank vs. Redmond, 226 U. S. 1337, Munn. vs. Ill., 94 U. S. 113; Adams vs. Tanner, 244 U. S. 590; McLean vs.

Arkansas, 211 U. S. 539, Brass vs. North Dakota, 152 U. S. 391; German Alliance Insurance Co. vs. Lewis, 233 U. S. 389.

IV.

Section 27 of The Bingham Act Undertakes to Regulate Interstate Commerce

Now, in the first place, it will be observed that section 27 is directed against "any person, firm or corporation, operating a warehouse within the state of Kentucky," whether residing in Kentucky or out of it.

In the second place, that the statute is violated whenever any such person, firm or corporation, whether in or out of Kentucky, solicits or persuades or permits any member of any association," whether in or out of Kentucky, to breach his marketing contract.

In the third place, that such solicitation or persuasion or permission, whether in or out of Kentucky, consists merely in "accepting or receiving such members products," whether in or out of Kentucky, "for sale, or for auction or for display for sale" in Kentucky.

Conceiving section 27 to be violative of the commercial clause of the Federal Constitution, plaintiff in error called into question the validity thereof, both by demurrer to the petition and plea thereto asserting such constitutional rights.

Declining to hold that section 27 relates solely and exclusively to transactions in intra-state commerce, the

Court of Appeals of Kentucky in 208 Ky. 643, disposed of the question arising from the allegations of the petition framed by defendant in error and from the language of the section itself as follows:

"Neither do we attach any **importance** to the interstate commerce feature attempted to be injected into the case of counsel for defendant.

In the first place, it is not shown that the tobacco of the member whose contract defendant is charged with assisting to violate ever moved in interstate commerce, i. e., whether it was produced in this state and so moved. Again, it is extremely doubtful if it continued in interstate commerce after it had been removed from another state (if that was the fact) to defendants warehouse. Section 27 of the act does not attempt to penalize any of the steps necessary for such removal, and when the tobacco was deposited in defendants warehouse the latter would not be liable to the penalties of the act, unless it did something subsequent thereto to **complete** the violation of the members contract with the association. Whatever, therefore, was **thereafter** done, would be in relation to a **localized** and would **appear** to not involve the question of interstate commerce. But, beyond all that, we have seen that the Clayton Amendment to the Sherman Anti-Trust Law excludes such products from the provisions of the latter act, and thereby Congress relinquished its superior right to regulate interstate commerce with

eference to them and restored the right of the states o do so as long as that condition existed. It is there- ore clear that the case is not one in violation of the herman Anti-Trust Act for which defendant could naintain its counterclaim, either for the actual amount f its alleged damages, or for treble that amount as ttempted to be conferred by that act." R. 36-37.

In other words, the court holds, in the first place, hat the penalties in section 27 should be imposed "if ny person, firm or corporation," whether in or out of entucky, conducting a warehouse within the state of entucky, solicits or persuades or permits, in or out of entucky, to breach his marketing contract by merely ccepting or receiving such member's products," in or ut of Kentucky, "for sale or for auction or for display r sale," at such warehouse in Kentucky, whether be accepted or received, "for sale or for auction or r display for sale," in bulk or hogsheads or original ckage or not; and, further, although the alleged tort **gun** in another state is **"completed"** in Kentucky, yet, ter the tobacco reaches such warehouse, whether in lk or hogsheads or original packages, it is then and ere or thereafter so "accepted or received for **sale** or **auction** or for **display for sale"** merely as a "local- d community"; and, therefore, however comingled acts may be, nevertheless whatever is done in rela- n to it **"appears"** to involve only the question of in- state commerce.

In the second place, the court holds that section 27 is not in conflict with the commercial clause of the Federal Constitution and is therefore valid; because, it is asserted, Congress has relinquished its superior right to regulate interstate commerce with reference to farm products, including tobacco, and for the present has restored the right of the states to do so.

In response to the first proposition attention is called to the opinion of this court in the case of Binderup vs. Pathe Exchange 263 U. S. 309; wherein it is said:

"Does the circumstance that, in the course of the process, the commodity is consigned to a local agency of distribution to be by that agency held until delivery to the lessee in the same state put an end to interstate character of the transaction and **transform** it into one of purely intra-state. We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity."

In the case of Stafford vs. Wallace, 258 U. S. 516, it is said: "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the

West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. **The commission men are essential in making the sales without which the flow of the current would be obstructed,** and this, whether they are made to packers or **dealers.** The **dealers** are **essential** to the **sales** to the stock farmers and feeders. **The sales are not, in this aspect, merely local transactions.** They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well understood course of business. **The stockyards and the sales are necessary factors in the middle of this current of commerce."** Swift & Company vs. United States, 196 U. S. 375.

In the case of Shafer vs. Farmers Grain Co., decided by this court on May 4, 1925, it is said:

"Buying for shipment, and shipping to markets in other states, when conducted as before shown, constitutes interstate commerce_____the buying being as much a part of it as the shipping. We so held in Lemke vs. Farmers Grain Co., 258 U. S. 50, following

and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford vs. Wallace, 258 U. S. 495. Binderup vs. Pathe Exch. 263 U. S. 291.

"Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation wide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denies to the states by the commerce clause of the Constitution .....The defendants make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the states that are affected."

"Again, **tobacco** is a product which has been recognized by custom, as well, as by Acts of Congress as a fit subject for barter and sale and is one of the subjects, **national in character**, which it is within the exclusive power of Congress to regulate." Austin vs. Tenn. 179 U. S. 343; Cook vs. Marshall County, 196 U. S.

261; Notes to 60 L. R. A. 640, 40 L. R. (N. S.) 866.

Moreover, in 5 R. C. L. at page 765, it is said: "The question whether the state police power to the extent of regulation or prohibition can be exerted on certain subjects because it is supposed that the use of the particular commodity is harmful and it is believed that its sale should be regulated or prohibited; has been considered with reference to several subjects, such as intoxicating liquors, cigarettes, and oleomargerine. While the denial of the right of a state to regulate or prohibit the sale of such commodities has been put upon the ground, that they are well recognized articles of commerce and that their sale could not be burdened or prohibited by a state, the controlling reason seems to have been that, notwithstanding objection which might be taken to their use, they have been recognized by the laws of Congress **as legitimate articles of commerce.**" Leizy vs. Harden, 135 U. S. 100.

Furthermore, in 5 R. C. L. at page 770, it is said: "It makes no difference with reference to the interstate character of a sale made on a contract for the purpose of goods which are to be shipped from another state that the goods are to be consigned to the shipper or the agent to whom the order is given and to be delivered to the agent on payment of the purchase price, nor is the transaction deprived of its interstate character by employing any other agent or agency in the delivery of the purchased goods. And the fact that goods ordered

by several purchasers are shipped in bulk to the agent and are delivered by the agent to the respective purchasers **after breaking the bulk,** makes no difference as to the **interstate character** of the sales."

Indeed, the rule is well settled that a statute, like the one in question, purporting to have been enacted to protect the public health, the public morals, the pubic safety ,or to serve the public conveniences, must have some real, or substantial relation thereto and can, in no event, be allowed to operate so as directly to burden interstate commerce or even to **trench** upon these subjects which are within the exclusive power of Congress to regulate. This declaration was first enunciated by Chief Justice Marshall in the great case of Gibbons vs. Odgen 9 Wheat, 1, and its principles have been applied in the case of Hannibal & St. J. vs. Titusville, 153 U. S. 289; M. K. & T. Ry. Co., vs. Haber, 196 U. S. 663; Schollenberger vs. Penn. 171 U. S. 1, Austin vs. Tenn. 179 U. S. 343.

Since the Act in question, under regulations therein prescribed and penalties denounced, forbids warehousemen in all the states of the Union conducting warehouses in Kentucky from shipping their products of Burley Cooperative Growers into Kentucky for sale at public auction over the floors of loose leaf tobacco warehouses, regardless of the nature of the contracts under which the shipments are made, or the manner and condition in which the products are shipped, it fol-

lows that the Act in question directly interferes with the transportation, by land or water from one state to another, which transportation is itself interstate commerce." Phil. & Southern S. S. Co. vs. Penn. 122 U. S. 326.

Indeed, every act of Congress extends to every part of interstate commerce, and to every instrumentality or agency, by which it is carried on; and the full control of subjects committed to its regulation cannot be denied or forfeited by the **commingling** of interstate operations." Minn. Rates Cases, 230 U. S. 362.

In the case of Vance vs. Vandercook Co., 170 U. S. 344, it is held that the power to ship merchandise from one state into another carried with it, as an incident, the right of the receiver of the goods to sell them in original packages, state regulation to the contrary, notwithstanding, unless Congress recognized the power of the state to control the incidential right to sell in original packages.

In the case of Ex parte vs. Jevey, 66 Fed. 959 and Jervey vs. The Carolina, 66 Fed. 1013, it is held that a state statute declaring it to be a misdemeanor, punishable by fine or imprisonment for any person except as provided in the Act to **bring into the state**, by any means or mode of carriage, any liquor or liquors, containing alcohol, is clearly a regulation of commerce."

In the case of Bowman vs. Chicago Ry Co. etc., 125 U. S. 498, it is said: "For the purpose of this

policy, a state legislature has control exclusive of Congress within its territory, of all persons, things and transactions, of strictly internal concern_____it cannot without the consent of Congress, express or implied, regulate commerce between its people and those of other states of the Union in order to effect its end, **however desirable such regulation may be."**

In Henderson vs. Meyer, 92 U. S. 259, it is said: "It is clear, from the nature of our complex form of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is **void,** no matter under **what** classes of powers it may fall, or **how closely allied to powers conceded to belong to the states."**

In re: Sanders, 52 Fed. 802, Judge Goff said: "I conclude, that the police power of the state cannot be held to embrace a subject confided exclusively to Congress by the Constitution of the United States. If the **subject matter** of state legislation is included in the exclusive grant of commercial power to Congress, then the state enactment is void, **even if it passed in the exercise of the police power of the state.** The authorities in support of this are, numerous and from them I cite Railroad Company vs. Husen, 95 U. S. 465; Cutcher vs. Kentucky, 141 U .S. 47; Leizy vs. Harden, 135 U. S. 108."

In the case of State vs. Jacobson 80 Ore. 648, it

s held that: "A statute regulating the sale of eggs hipped or imported into the state from any foreign ountry, which requires every person selling or offering for sale any food or drink, the ingredients of which re in part composed of imported eggs shall display in a onspicuous place a sign of stated size and design bearng the words: "Imported Eggs Used Here" does not im at the quality, condition, or purity of the articles of ood but **solely at the place from whence the article is hipped,** and does not call into requisition the police ower of the state."

In the case of Collins vs. New Hamp. 171 U. S. 3, it is said: "It is clearly plain that if the state has ot the power to absolutely **prohibit** the sale of an rticle of commerce like oloemargerine, in its trus state, t has not power to provide that such article shall be **olored,** or rather **discolored,** by adding a foreign subtance to it in the manner described in the statute."

So, likewise ,in the case at bar, if the state has ot power absolutely to prohibit the sale of tobacco, it as not power to provide penalties amounting to proibition of sales thereof except at a particular place and n a particular way.

In response to the second proposition, attention is alled to the opinion of this court in the case of Duplex rinting Press Co. vs. Deering, 254 U. S. 469, wherein t is said: "As to section 6, it seems to us its principle mportance in this discussion is for what does **not** au-

thorize, and for the **limit** it sets to the immunity conferred.

The section assumes the **normal** objects of a labor organization, to be legitimate, and declares that nothing in the Anti-Trust Laws shall be construed to forbid the existence and operation of such organization, or to forbid their members from **lawfully** carrying out their legitimate objects, and that such organization shall not be held in **itself** merely because of its **existence** and **operation,** to be an illegal combination or conspiracy in restraint of trade. But, there is nothing in the section to **exempt** such an **organization** or **its members** from accountability where **it** or **they** depart from it **normal** and **legitimate** objects and engage **in actual combination or conspiracy in restraint of trade.** And by no fair or permissible construction can it be taken as authorizing **any** activity otherwise unlawful, or enablying a normal lawful organization to become a **cloak** for an illegal combination or conspiracy in restraint of trade as defined by the Anti-Trust Laws."

V.

Since The Bingham Act As a Whole Section 25 In Particular Is Repugnant to the Federal Constitution the Answer of Plaintiff In Error Contains Good Defenses and Its Counterclaim Constitutes a Direct Action For Damages.

A.

PARAGRAPH ONE. ESTOPPEL.

In the first paragraph of its answer and counter-claim to which a demurrer was interposed, plaintiff in error alleged facts showing defendant in error to be an unlawful monopoly, trust and combine. Now, if in such a case a recovery cannot be had upon a **contract** sought to be enforced which was made to further the objects of an illegal combination, as held in the case of Continental Wall Paper Co. vs. Lewis Voight, etc., 212 U. S. 227, then upon what principle of law can a recovery be had where damages are sought against a **third** party for inducing the breach of a contract, which, if sued upon would itself have been unenforceable?

The pleadings alleged and it is admitted that both plaintiff in error and defendant in error are engaged in interstate, as well as, intrastate commerce. Hence, "Where the direct and immediate effect of a contract or combination among particular dealers in a commodity to destroy competition between them and others, so that the parties to the contract or combination obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in

limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. Addyston Pipe Co., etc., U. S. (1899) L75 U. S. 211; C. N. O. Fuel Co. vs. U. S. 155 Fed. 610; O'Halloran vs. American Sea Breen Slate Co., 207 Fed. 187. In the case of Ford Motor Co. vs. Union Motor Sales Co., 244 Fed. 156, it is said:

"It is the general and well settled rule that a system of contracts between a manufacturer and retail dealers, by which the manufacturer in connection with absolute sales of his product, attempts to control the resale prices for all sales, by all dealers eliminating all competition and fixing the amount which the ultimate purchaser shall pay, amounts to restraint of trade, and is invalid both at common law, and so far as it affects interstate commerce under the Sherman Anti-Trust Act." Miles Medical Co. vs. John D. Park, etc. Co., 220 U. S. 373; U. S. vs. Kellog Toasted Corn Flakes Co., 22 Fed. 725; Knawer vs. U. S. 237 Fed. 8, Monarch; Tobacco Works vs. American Tobacco Co., 165 Fed. 774; Swift vs. U. S. 196 U. S. 375. But, we are not left alone to the citation of cases expounding the efficiency of Federal Anti-Trust laws. Notwithstanding the repeal of the Anti-Trust Act of 1890 by the General Assembly of Kentucky during the same session which it enacted the Bingham Act, there stands the

sturdy oak of a thousand years, the grand old common law, riven but not destroyed, still towering in its strength and beneficience, altho its stalwart companion lies prostrate at its side. Gay vs. Brent, 166 Ky. 883; Commonwealth vs. Hatfield Coal Co., 186 Ky. 411; Love vs. Kozy Theatre Co., 193 Ky. 336,—all loudly acclaim its power for righteousness. To which, alas, some in Kentucky are no longer subject; who have been licensed to afflict others with evils of monopoly worse than all the plagues of Egypt.

Indeed, in the opinion of the Court of Appeals of Kentucky in this case it is said: "We may add to what was said in that opinion that there is no statute in this state, nor was there any when the cause of action herein arose, against pools, trusts and monopolies and by the Clayton Amendment to the Sherman Anti-Trust Act, (38 Stat. 730) agricultural products were expressly excluded from that act; which left, as the only law against such combinations, the common law, **provided it prevailed in this state as to agricultural products after the enactment of the Bingham Act.** It is, however, conceded that it is competent for a Legislature to repeal the common law prevailing in the jurisdiction where it sits, the same as it may repeal a prior statutory enactment, and section 28 of the Bingham Act expressly provided that the organization of the cooperative marketing companies provided for by it shall not be deemed "to be a conspiracy nor a com-

bination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state." It is then provided in the same section that.....

"The marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade, etc."

It would therefore seem that section 28 of the act expressly repealed any rule of the common law that might prevail in this state militating against the legality of such contracts. **However, if it should be contended that such a provision was itself unconstitutional, it could only be so held upon the ground that it was an unwarranted classification** which the Potter opinion, and many others we might cite, held was untrue."

Nevertheless, it is submitted that the contract in question, under the admitted facts, having been entered into for the purpose of creating a monopoly, pool and trust, is illegal and is against the public policy of Kentucky as to all others than the class to which defendant in error belongs; and, therefore, defendant in error cannot constitutionally avail itself of such arbitrary classification and assert a right to recover damages from plaintiff in error for a breach thereof, so long as the Commerce Clause and the 14th Amendment stand.

Now, in section one of the Bingham Act which is

883 f-l Ky. statutes, its policy is boldly declared to be "to stabilize the marketing of agricultural products." Does the word "stabilize" mean, and, indeed, can it mean anything except that power is thus attempted to be given to organizations created under this Act artificially to do away with the fluctuation of prices arising out of the normal operation of the law of supply and demand? In section 883 f-y Ky. statutes, growers of tobacco in such associations are **exempted** from the provisions of law in conflict with the Bingham Act, namely, the common law and from any and all existing laws applying to agricultural products in the possession of or under the control of the individual producers on delivery of such products to it by its farmer members."

In section 883 f-l Ky. Statutes, there is this further provision: "Any association organized **hereunder** shall be deemed not to be a conspiarcy nor a combination in restraint of trade nor an **illegal** monopoly nor an attempt to lessen competition nor to fix prices arbitrarily or to create a combination or pool in violation of any law of this state; and the marketing contracts and agreements between the association and its members and any agreements authorized in this Act shall be considered not to be illegal, nor in restraint of trade nor contrary to the provisions of **any** statute enacted against pooling or combination." Section 27 has already been adverted to, and other discriminations are also apparent. Thus it will be seen that the Bingham Act fairly bristles

with inequalities. Consequently, do not these inequalities render the Act both in whole and in part repugnant to the 14th Amendment to the Federal Constitution?

Now with respect to the 14th Amendment, in determining the legality of classification for legislative regulation, it is necessary to consider not only the subject to be regulated, but also the character, extent and purpose of the regulation, as well as, the class of persons legally and naturally affected thereby. Hence, the question at once arises whether those belonging to the class legally and naturally affected by the so-called police regulation are contained in the class therein made or whether any are illegally excluded therefrom? For if persons under the same circumstances and conditions are treated **differently** the Act in question does not classify, but arbitrarily **discriminates.**" See Hing vs. Crowley, 113 U. S. 702, Ry. Co. vs. Beckwith, 129 U. S. 26; American Sugar Refining Co. vs. Louisiana, 179 U. S. 89; McFarland vs. American Refining Co., 241 U. S. 79.

In 6 R. C. L. section 396, it is said: "The courts generally are opposed to a recognition of farmers and persons engaged in argricultural pursuits as forming a separate class within the limits allowed by the federal constitution securing to all the equal protection of the laws. Hence, it is that statutes purporting to prohibit the formation of trusts for the purpose of fixing the price or regulating the production of articles of com-

merce, but exempting from their provisions all persons engaged in agriculture and raising live stock, are unconstitutional as class legislation denying the equal protection of the laws **to those not included in the exempted class.**" Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 U. S. (L ed) 479; Brown vs. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 A. S. R. 126, 57 L. R. A. 547; see also Davis vs. Mass. 167 U. S. 17 S. Ct. 437, 38 U. S. (L ed) 71; New York, etc., R. Co. vs. Bristol, 151 U. S. 567, 14 S. Ct. 437, 38 U. S. (L ed) 269; Cantina vs. Tillman 54 Fed. 974 Smith 38 Cal. 702; Parks vs. State 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; State vs. Bohemier, 96 Me. 257, 52 Atl. 643; State vs. Latham 115 Me. 176, 98 Atl. 578; American Coal Co. vs. Allegany County Comrs. 128 Md. 594, 98 Atl. 143; Com. vs. Abrahams 156 Mass. 57, 30 N. E. 79, People vs. Coolidge 124 Mich. 664; McKinster vs. Sager 163 Ind. 671.

The doctrine in the Connolly case, supra, has recently been invoked and applied by Mr. Chief Justice Taft in the illuminating case of Truax vs. Corrigan, 257 U. S. 335, wherein it is said: "There is the necessary effect of Connolly vs. Union Sewer Pipe Co. 184 U. S. 540, 46 (L ed) 679, 22 Sup. Ct. Rep. 431, where an Anti-Trust Act was held invalid under this same clause because it contained the excepting provision "That it should not apply to agricultural products or

live stock while in the hands of the producer or raiser." That was a stronger case than this, because the whole statute was one dealing with economic policy and was a declaration of mala prohibita that had theretofore been lawful, from which it was strongly argued, that the exception was justified in the interest of agriculture and was a proper exception by permissible classification. Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, **except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws then it is hard to conceive what would be.** To hold it, not to be, would be, to use the expression of Mr. Justice Brewer in Gulf C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150, 154, 41 (L. ed) 666, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause " a rope of sand." See also In re: Opinion of Justices, 211 Mass. 618.

Now, in the case of U. S. vs. American Linseed Oil Co., 262, U. S. 388, it is said. **"THE PRICE OF OIL BECAME MORE STABLE.** Defendants continued with meticulous care actively to carry out the several provisions of the agreement amongst them; and that they intended further to pursue the plan unless restrained is not denied.

The obvious policy, indeed, the declared purpose

of the arrangement was to **submerge** the **competition** theretofore existing amongst the subscribers, and substitute "intelligent competition" or open competition to eliminate "unintelligent selfishness" and establish "100 per cent confidence", **all to the end that the members might stand out from the crowd as substantial coworkers under modern cooperative business methods.**". In American Column & Lumber Co., 257 U. S. 66, (L ed) 284, A. L. R. 1093, 42 Sup. Ct. Rep. 114, we considered a combination of manufacturers got up to effectuate this new combination of confidence and competition and held it within the inhibition of the Sherman Act because of inevitable tendency to destroy real competition as long understood and thereby restrain trade. Our conclusion there cannot be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict.

The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and these abnormal contracts and combinations which tend directly to suppress the conflict for advantage called "competition", the play of the contending forces ordinarily engendered by an honest desire for gain. The statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods by agreements or otherwise, to accomplish such purpose. . . . The words "restraint of trade" should

be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—**the free movement of which it was the purpose of the statute to protect.** United States vs. American Tobacco Co., 221 U. S. 106, 179, 180, 55 (L. ed) 663, 694, 31 Sup. 632, Charles A. Ramsay Co. vs. Associated Bill Posters 269 U. S. 501, ante, 368, 43, Sup. Ct. Rep. 167, Federal Trade Commission vs. Sinclair Ref. Co., 261 U. S. 463, ante, 746, 43, Sup. Ct. Rep. 450.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it, **the court can see that its necessary tendency is to suppress competition in trade between the states,** the combination must be declared unlawful. That such is its tendency we think must be affirmed.

To decide otherwise would be wholly inconsistent with the conclusion reached in American Column & Lumber Co. vs. United States, supra."

In 19 R. C. L. section 21, it is said: "The purpose in all the prohibitions against monopolies and restraint of trade was to preserve the freedom of trade by means of free competition **between the traders themselves,** in order that the public should not be required

to pay exorbitant prices for articles of common use and necessity. It was to prevent any man or set of men, from possessing the power arbitrarily to determine the price at which an article of common use shall be sold. The courts are practically unanimous in holding unlawful all agreements and combinations, **in whatever form or name,** by and between independent and unconnected manufacturers and dealers for the purpose of directly controlling the prices of their commodities, **either by restricting or monopolizing their supply,** or by limitation of production, or by restriction on sales or distribution, or by express agreements to maintain specified prices. A combination to fix the price of an article of prime necessity was a criminal conspiracy at common law, and still is under the Anti-Trust Laws of most of the states. Necessity or beneficient purpose or effect is no justification for a combination to raise prices. **That the price actually fixed is reasonable is no defense."**

And in section 43 thereof it is further said: "Any agreement or combination, which directly operates, not alone upon the manufacturers, but upon the **sale, transportation,** and **delivery** of an article of interstate commerce, by preventing or **restricting** its **purchase, sale** or **exchange** or by **destroying, restricting** or **stifling** free competition therein, **thereby regulates and restrains interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature**

and violates the statute.

And there does not seem to be any doubt that the combinations formed for the purpose of fixing and maintaining arbitrary and non-competitive prices or rates are illegal under the statute. The act does not contemplate that the combination therein made unlawful must be one which shall by its terms **refer** to interstate commerce. **It is enough if its purpose and effort are necessarily to restrain interstate trade.** If it were otherwise, all combinations in restrain of interstate trade **might be so expressed in words as to avoid the statute.** The true test would seem to be, not what the agreement professes, **but what it accomplishes.** The combination must be dealt with in view of the known facts which surround it when it was formed, and which attend it thereafter. To vitiate a combination such as the act of Congress condemns, **it need not be shown that the combination, in fact, results or will result in a total suppression of trade,** or in a complete **monopoly,** but it is only essential to show that, by its necessary operation, **it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition.** A combination that has obtained a virtual monopoly of interstate trade in a given commodity is clearly forbidden by the act. And **business device** by which a considerable number of competing corporation or growers are weld-

ed into a single corporate entity which controls **practically all** the commerce of the country in a particular branch required for the economical production of a necessity of mankind of such monopoly. Trade and commerce are "monopolized" within the meaning of the Federal Statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control rates or prices. **It is not necessary that the power thus obtained should be exercised."**

In view of the foregoing authorities, since it inevitably follows that the Bingham Act is invalid, and, consequently, the contract for inducing a breach of which recovery is sought being null and void, as well as, the section upon which a right of recovery rests, it is submitted that the first paragraph of the answer and counterclaim of plaintiff in error presented a good defense.

B.

PARAGRAPH TWO OF ANSWER AND COUNTERCLAIM

The argument presented and the authorities cited in support of the contention of plaintiff in error with respect to the first paragraph of its answer and counterclaim, render discussion of the contention in the second paragraph unnecessary.

C.

PARAGRAPH THREE CONTAINING COUNTER-

CLAIM OF PLAINNTIFF IN ERROR IS EQUIV-ALENT TO A DIRECT ACTION FOR DADMAGES.

The defendant in error having selected the forum in which to litigate the nature and character of its business, it became incumbent upon plaintiff in error there to present all questions arising out of or connected with conduct of the business of defendant in error of which the transaction in question formed a part; and, consequently, to present not only its defense to the suit, but also to ask for affirmative relief.

Hence, plaintiff in error, having been injured by the method of defendant in error in conducting its business, was compelled to ask for relief asserted in the third paragraph of its answer in the form of a counterclaim; because the admitted facts therein recited conclusively show defendant in error to be a monopoly, trust and combine operating in violation of the Federal Anti-Trust Laws. Clabough vs. Southern Wholesale Growers Association, 181 Fed. 706.

In other words, if the suit of defendant in error for an alleged tort may be likened to a suit for an assault and battery, the counterclaim of appellee may be likened to a claim for damages arising out of a plea of Son Assult Demesne. Slone vs. Slone, 2 Met. 339; Whitlock vs. Redford, 82 Ky. 390; Forbes vs. Cooper, 88 Ky. 285.

In Newmans Pleading and Practice, Vol. 1. section 384 c, it is said: "It may often happen that a petition contains a good cause of action, but has in it one or more allegations sought to be stricken out. In such a case the defense cannot be reached by a demurrer, but by motion to strike out the particular allegations designed. Upon such a motion, altho, the facts as stated may not of themselves show the plaintiff to be entitled to any additional relief beyond what he would be entitled to without them, the court will not strike them out. Hence, on the motion to strike any allegations as irrevalent, the question is presented to the court, whether, in any particular aspect of the case, the fact sought to be stricken out be material to the granting of any relief to which the party may be entitled. And it is hereby remarked that the court will be inclined to discourage motions to strike out, and in doubtful cases, or where the matter objected to its trivial, will overrule the motion."

Now, if upon the authorities cited, section 27 of the Bingham Act is invalid, then defendant in error has no right of action, and the counterclaim of plaintiff in error stands alone as a direct action. In that event, if, for any reason, it should be proper to eliminate from the third paragraph so much of its allegations as invokes damages under the Sherman Anti-Trust Act; yet, there would remain sufficient allegations to enable plaintiff in error to amend and, under the facts stated, invoke dam-

ages pursuant to the provisions of the common law. L. & N. Ry. Co. vs. Pointer, 113 Ky.

For, in 19 R. C. L. section 155, it is said:

"Any person who has been injured in his trade or business by the activities of an unlawful combination for that purpose is now generally held to be entitled to recover damages in an action at law for the loss suffered, both at common law and under Anti-Trust Statutes. Many Anti-Trust Statutes expressly confer a right of action for the full amount of damages sustained in consequence of any violation of the provisions of the act, and a few, following the Sherman Act permit the injured party to recover twofold or threefold the damages by him sustained, including a reasonable attorney fee. Some courts permit such damages to be pleaded by way of counterclaim or set off in an action by a member of the combination for goods sold, but others hold that damages can be recovered only in a direct action. The fact that the plaintiff in an action for damages was formerly a member of the association causing the injury and participated in the adoption of its constitution and by-laws does not affect his right of action when the acts complained of occurred after he ceased to be a member, since he is not in such a case **in pari delicto.**"

In the case of Shoshone Mining Co. vs. Rutter, 177 U. S. 513, it is said:

"And finally it is said that Congress cannot confer

any jurisdiction on the state courts, that they may decline to entertain these adverse suits, and that Congress cannot compel them to do so. But, here again we are met with the fact that Congress has left all controversies in respect to right of possession, not exceeding $2,000 in value, to the state courts. It evidently proceeded upon the supposition which is a rightful one, that, as by the express terms of the United States shall be made in pursuance thereof____shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state contrary notwithstanding, no courts, national or state, would decline to carry into effect the acts of Congress. Whether, if a state court should refuse upon these statutes, the matter is one which could be corrected by error in this court, is immaterial. If it shall appear that the state courts decline to entertain such jurisdiction, and that it cannot be enforced upon them, Congress may further legislate. Evidently, thus far in these cases, as in many others, there has been no reason to suppose that any courts of the United States would decline to enforce the laws of the United States or to carry into effect their provisions."

Now, the contention of plaintiff in error is that the practices, purposes, and illegal acts, the commission of which defendant in error admits and which are done under the supposed authority of the Bingham Act, under the provisions of that act a gross discrimination,

repugnant to the Federal Constitution, which repugnancy constitutes a defense to the action, as well as a ground for cross action at least for damages at common law.

For, the counterclaim of plaintiff in error is not a suit in equity to prevent and restrain violations of the Sherman Act; nor does it indirectly attack the existence of defendant in error corporation, but calls in question the **powers** which the corporation has undertaken to exercise by reason of which plaintiff in error has been injured. Therefore, the case at bar is distinguished from the case of Wilder vs. Corn Products Co., 236 U. S. 165, in that the corporation in that case was organized under a constitutional statute; whereas, the corporation in this case was organized under an unconstitutional statute, as the admitted facts show, and, therefore, its contracts for inducing a breach of which plaintiff in error has been sued are **inherently** illegal.

Hence, the elementary rule that courts will not exert their powers to enforce illegal contracts applies to the suit of the defendant in error. The reason why the rule did not apply in the Corn Products case is given by the court as follows: "The **only** suggestion as to the **intrinsic** illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year; and the clause to the effect that the goods were bought by

the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract for sale was illegal because of these conditions." Manifestly, there is a wide difference between that case and the case at bar.

In the case at bar because the Court of Appeals of Kentucky held it to be correct practice to file the counterclaim it, therefore, considered, the question as to the constitutionality of the Bingham Act both in whole and in part; but rested its disallowance thereof, first, upon the ground that because of its partial repeal, the remedies of the common law available against all others for violations thereof cannot be invoked in Kentucky against those of the class to which defendant in error belongs; and, second, upon the further ground that remedies available against all others for violations of the Sherman Anti-Trust Law, as amended, cannot be invoked herein because defendant in error as one of a favored class has been exempted from the penalties threin provided.

For the reasons heretofore given it is the contention of plaintiff in error that both of these grounds are untenable; and, further, that the judgment of the Court of Appeals of Kentucky is in all respects erroneous and should be reversed. Respectfully submitted,

ALLAN D. COLE,
Counsel for Plaintiff in Error.

J. M. COLLINS, Of Counsel.

APPENDIX

AN ACT authorizing the formation of non-profit, co-operative associations, with or without capital stock, for the purpose of encouraging the orderly marketing of agricultural products through co-operation; defining the various terms used therein; enumerating the activities and powers of such an association; prescribing the rights and privileges of membership; providing for articles of incorporation, declaring what they shall contain, manner of expecting and filing, method of amending same; providing for by-laws and what they may contain; providing for method of election of directors, filling of vacancies; powers and duties of directors; division into election districts; appointment of executive committees and allotment of functions and powers; providing for officers, qualifications, election and functions; regulating issuance of membership certificates or stock and payment therefor; limiting personal liability of members for debts of association; regulating voting power of members and stockholders; authorizing issuance of preferred stock, with or without right to vote; and the retirement thereof providing for removal of officers and directors; providing for referen-

dum to members; providing for a marketing contract; and prescribing remedies for breach of contract, including liquidated damages, fees and all costs; authorizing injunction and general equitable remedies in the event of breach of agreement; stating presumption of control of products by landlords who have signed marketing agreements; providing for annual reports; providing that no provision of law in conflict with this act shall be construed as applying to such associations; providing that legal exemption of agricultural products in the possession of producers shall apply to such products in possession of, or under the control of, such associations; limiting the use of the word "Co-operative" in names for producers' co-operative marketing activities; and prescribing a penalty for violating such inhibition; permitting associations to organize other corporations or to own stock in other corporations; providing for agreements with other co-operative associations in this or other states and stating the purposes or reasons therefor; providing that associations heretofore organized may re-organize hereunder; making it a misdemeanor to induce a member to breach his marketing contract with the association, or spread false reports about it and prescribing a fine for each offense; making such offender liable to the association for a prescribed penalty therefor in a civil suit; providing liability to the association in a penal sum in certain cases for any person who knowingly solicits, persuades

or permits any member of the association to breach his marketing contract; authorizing an injunction against such warehouseman; and providing for payment of all fees and costs; and setting out the reasons for such provisions; providing that no such association shall be deemed a conspiracy or an illegal combination or monopoly or in violation of any law of this State; and providing that marketing contracts shall not be considered illegal; providing that if any section of this act shall be declared unconstitutional, the remainder of the act shall not be thereby affected; providing that the general corporation laws of this State shall apply to such associations, except where inconsistent with express provisions hereof; providing for taxation respecting the association's shares and property; providing fees for filing articles of incorporation and amendments thereto; providing that this act may be hereafter indexed, and cited as "The Bingham Co-operative Marketing Act", and declaring an emergency to exist.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY:

1. DECLARATION OF POLICY.

(a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agri-

cultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this Act is passed.

2. DEFINITIONS.

As used in this act.

(a) The term "agricultural products" shall inlude horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

(b) The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock.

(c) The term "association" means any corporation organized under this act; and

(d) The term "person" shall include individuals, firms, partnerships, corporations and assocaitions.

Associations organized hereunder shall be deemed "non-profit" inasmuch as they are not organized to make profit for themselves as such, or for their members, as such, but only for their members as producers.

(e) For the purposes of brevity and convenience this Act may be indexed, referred to and cited as "The Bingham Co-operative Marketing Act."

3. WHO MAY ORGANIZE.

Twenty (20) or more persons, a majority of

whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act.

4. PURPOSES.

An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

5. PRELIMINARY INVESTIGATION.

Every group of persons contemplating the organization of an association under this act is urged to communicate with the Dean of the College of Agriculture of the University of Kentucky, who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group

or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky.

6. POWERS.

Each associations incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members, or

the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member, except for storage.

(b) To borrow money without limitation as to amount of corporate indebtedness or liability; and to make advances to members.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may

be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conductive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and, in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act; and to do any such thing anywhere.

7. MEMBERS.

(a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, persons only engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

(b) If a member of a non-stock association be other than a natural person, such member may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

8. ARTICLES OF INCORPORATION.

Each association formed under this act must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and addresses of those who are to serve as incorporating directors for the first term, or until election and qualifications of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the general rule

or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and definite extent of the preference and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provision of the general corporation law of this State; and when so filed the said articles of incorporation or certified copies

thereof, shall be received in all the courts of this State and other places, as prima facie evidence of the Facts contained therein and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Dean of the College of Agriculture of the University of Kentucky.

9. AMENDMENTS TO ARTICLES OF INCORPORATION.

The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this State.

10. BY-LAWS.

Each association incorporated under this Act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this Act. A majority vote of the members or stockholders, or their written assent, is necessary to adopt such by-laws. Each association, under its by-laws, may provide for any or all of the following matters:

(a) The time, place and manner of calling and conducting its meetings.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail or both; and the conditions, manner, form and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensation and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the associaion; the charge, if any, to be paid by each member or stockholders for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every

member or stockholder may be required to sign.

(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the Board of Directors. In case of the withdrawal or expulsion of a member, the Board of Directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

11. GENERAL AND SPECIAL MEETINGS—HOW CALLED.

In its by-laws, each association shall provide for

one or more regular meetings annually. The Board of Directors shall have the right to call a special meeting at any time; and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting; provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association.

12. DIRECTORS—ELECTION.

The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may

provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the reslut of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association. The by-laws may provide that one or more directors may be appointed by any public official or commission or by the other directors selected by the members or their delegates. Such directors shall represent primarily the interest of the general public in such associations. The directors or directors so appointed need not be members or stockholders of the association; but shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

An assocaition may provide a fair remuneration for the time actually spent by its officers and directors in its service and for the service of the members of its executive committee. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association or others, or differing from terms generally current in that district.

The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

When a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors, by district. In such a case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy.

13. ELECTION OF OFFICERS

The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer, or unite both functions and titles in one person. The treasurer may be a bank or any depository, and as such, shall not be considered as an officer, but as a function, of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors.

14.—STOCK — MEMBERSHIP CERTIFICATE — WHEN ISSUED — VOTING — LIABILITY — LIMITATIONS ON TRANSFER AND OWNERSHIP.

When a member of an assoiation established with-

out capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a co-operative association shall own more than one-twentieth (1-20) of the common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth (1-20) of the common stock.

No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him.

Any association organized with stock under this act may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be

provided for by the articles of incorporation and printed on the face of the certificate.

The by-laws shall prohibit the transfer of the common stock of the associations to persons not engaged in the production of the agricultural products handled by the association; and such restriction must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter.

15. REMOVAL OF OFFICER OR DIRECTOR.

Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by five per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer, against whom such charges have been brought, shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting

to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district, the director in question shall be removed from office.

16. REFERENDUM.

Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership or the stockholders for decision at the next special or regular meeting; provided, however, that a special meeting may be called for the purpose.

17. MARKETING CONTRACT.

The association and its members may make and execute, marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified part of their agricultural products or specified

commodities exclusively to or through the assocaition, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the product passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or re-sell the products delivered by its members, with or without taking title thereto; and pay over to its members the resale price after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding eight (8) per cent per annum upon common stock.

18. REMEDIES FOR BREACH OF CONTRACT.

The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be

valid and enforceable in the court of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(c) In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others whose tenancy or possession or work on such land or the terms of whose tenacy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such a marketing agreement; and in such actions, the foregoing remedies for non-delivery or breach shall lie and be enforceable against such landowner, landlord or lessor.

19. PURCHASING BUSINESS OF OTHER ASSOCIATIONS, PERSONS, FIRMS OR CORPORA-

TIONS—PAYMENT—STOCK ISSUED.

Whenever an association, organized hereunder with preferred capital stock shall purchase the stock or any property or any interest in any property of any person, firm or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred capital stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued.

20. ANNUAL REPORTS.

Each association formed under this act shall prepare and make out an annual report on forms to be furnished by the Dean of the College of Agriculture of the University of Kentucky, containing the name of the association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a non-stock association; the total expenses of operations; the amount of its indebtedness or liabilities, and its balance sheets.

21. CONFLICTING LAWS NOT TO APPLY.

Any provisions of law which are in conflict with this Act shall not be construed as applying to the associations herein provided for. Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association.

22. LIMITATION OF THE USE OF TERM "CO-OPERATIVE".

No person, firm, corporation or association, hereafter organized or doing business in this State, shall be entitled to use the word "co-operative" as part of its corporate or other business name or title for producers' co-operative marketing activities, unless it has complied with the provisions of this act.

Any person, firm, corporation or association now organized and existing, or doing a producers' co-operative marketing business in this State and embodying the word "co-operative" as part of its corporate or other business name or title, and which is not organized in compliance with the provisions of this act, must, within six months from the date at which this act goes into effect, eliminate the word "co-operative" from its said corporate or other business name or title.

23. INTEREST IN OTHER CORPORATIONS OR ASSOCIATIONS.

An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipts delivered to the association on commodities of the association or its members, or delivered by the association or its members, shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

24. CONTRACTS AND AGREEMENTS WITH OTHER ASSOCIATIONS.

Any association, may, upon resolution adopted by

its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulataions, agreements and contracts and arrangements with any other co-operative corporation, association or associations formed in this or any other State, for the co-operative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means and agencies for carrying on and conducting their respective businesses.

25. ASSOCIATIONS HERETOFORE ORGANIZED MAY ADOPT THE PROVISION OF THIS ACT.

Any corporation or association, organized under previously existing statutes, may, by a majority vote of its stockholders or members, be brought under the provisions of this act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors to the effect that the corporation or association has, by a majority vote of the stockholders or members, decided to accept the benefits and be bound by the provisions of this act and has authorized all changes accordingly. Articles of incorporation shall be filed as required in Section 8, except

that they shall be signed by the members of the then board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation.

(a) Where any association may be incorporated under this act, all contracts heretofore made by or on behalf of same by the promoters thereof in anticipation of such association becoming incorporated under the laws of this State, whether such contracts be made by or in the name of some corporation organized elsewhere and when same would have been valid if entered into subsequent to the passage of this act, are hereby validated as if made after the passage of this act.

26. MISDEMEANOR TO INDUCE BREACH OF MARKETING CONNTRACT OF C-OPERATIVE ASSOCIATION — SPREADING FALSE REPORTS ABOUT THE FINANCES OR MANAGEMENT THEREOF.

Any person or persons or any corporation whose officers or employes knowingly induced or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, to who maliciously and knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100.00) dollars and not more than one thousand

($1,000) dollars for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense.

27. WAREHOUSEMEN LIABLE FOR DAMAGE FOR ENCOURAGING OR PERMITTING DELIVERY OF PRODUCTS IN VIOLATION OF MARKETING AGREEMENTS.

Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred (500) dollars for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violations of co-operative contracts.

28. ASSOCIATIONS ARE NOT IN RESTRAINT OF TRADE.

Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.

29. CONSTITUTIONALITY.

If any section of this act shall be declared unconstitutional for any reason, the remainder of this act shall not be affected thereby.

30. APPLICATION OF GENERAL CORPORATION LAWS.

The provisions of the general corporation laws of

this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this Act.

31. TAXATION.

The shares of corporations organized under this act shall be taxable as against the owner thereof of the period of assessment of other personal property for taxation in this State.

Such shares will represent in the aggregate all the property held or owned by such corporation, and when taxed as against the individual owner, all of the properey in the name of said association will thereby be taxed.

Under existing laws, crops grown in the year of assessment are exempt from tax whilst owned by the producer. So much of the value of each share of said stock as may represent the owner's proposition of crops grown by him and delivered to the association as herein provided, shall be exempt from taxation, inasmuch as it is the same thing exempted now by the constitution and laws of this State to such grower.

32. FILING FEES.

For filing Articles of Incorporation, an Association organized hereunder shall pay Ten ($10) Dollars;

and for filing an amendment to the Articles, Two and 50-100 ($2.50) Dollars.

33. WHEREAS, the agricultural interests of the State are of the utmost importance to the people of Kentucky; and

Whereas, a demoralized condition of the farming interests of the State exists, injuriously affecting all other business; and

Whereas, the highest interest of the State generally, demand immediate relief; and

Whereas, this Act is designed and intended to afford such relief,

Therefore, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval as required by law.

Approved January 10, 1922.